Nos.
258
263
270

SUPREME COURT, U.S.
FILED
JUL 1957
JAMES L. [illegible], Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 258

FROZEN FOOD EXPRESS, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Defendants.

MOTION TO AFFIRM

PHINNEY AND HALLMAN,
CARL L. PHINNEY,
LEROY HALLMAN,
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Attorneys for Frozen Food Express, Plaintiff.

Dated: June 7, 1957.

SUBJECT INDEX

	Page
STATEMENT	1
ARGUMENT	3
PROOF OF SERVICE	5

Index of Authorities

East Texas Motor Freight Lines, Inc. v. Frozen Food Express, et al., 351 U. S. 48-55 and 100 L. Ed. 917-924	3
Hartranft v. Wiegmann, 121 U. S. 609	3
Home Transfer and Storage Co. v. United States, 141 Fed. Supp. 599	4

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Defendants.

MOTION TO AFFIRM

Plaintiff, Frozen Food Express, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial so as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment entered on March 14, 1957, by a District Court of three judges especially constituted pursuant to 28 U. S. C. 1253, 2284 and 2325, insofar as such judgment sets aside and enjoins

the Interstate Commerce Commission's order of April 13, 1951, concerning the following commodities:

> dried egg powder; dried egg yolks; powdered milk; buttermilk; quick frozen fruits and vegetables; and peanuts, shelled, ground.

Frozen Food Express, plaintiff, is a motor common carrier transporting numerous commodities which the Interstate Commerce Commission ruled were non exempt under 49 U. S. C. 203(b)(6). It contends that such commodities are agricultural commodities. Plaintiff instituted a suit before a three-judge United States District Court for the Southern District of Texas, Houston Division, to enjoin the order of the Interstate Commerce Commission and have the order set aside. (Order of Interstate Commerce Commission complained of reported in 52 M. C. C. 511.) Plaintiff alleged that it is a common carrier by motor vehicle holding a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission which authorized it to transport certain commodities between designated points and territories, and that in addition to the transportation of the described commodities, it transports commodities which are exempt under said Section 203(b)(6), which transportation does not require a Certificate or Permit from the Interstate Commerce Commission so long as such motor vehicles are not used in carrying any other property or passengers for compensation.

The three-judge Federal Court dismissed the action saying that the order of the Commission was not subject to judicial review. On April 23, 1956, this Honorable Court

reversed the judgment of the District Court (351 U. S. 40, 44) (100 L. Ed. 910, 915). On September 13, 1956, the District Court heard this cause, and on December 31, 1956, rendered its decision. The opinion is included herein as plaintiff's Exhibit "A," and the judgment is plaintiff's Exhibit "B."

ARGUMENT

The decision of the District Court is correct as to the items of dried egg powder; dried egg yolks; milk, powdered; buttermilk; and quick frozen fruits and vegetables. As to the item "peanuts, shelled, ground," the District Court entered its order on motion of the Interstate Commerce Commission to correct clerical error in the judgment and opinion by substituting the phrase "ground peanut shells." This order was entered on April 22, 1957, and the item "peanuts, shelled, ground" should be no longer involved in this appeal. The District Court in its opinion followed the "continuing substantial identity test" prescribed by this Honorable Court in its decision *East Texas Motor Freight Lines, Inc. v. Frozen Food Express, et al., 351 U. S. 48-55*, and *100 L. Ed. 917-924*, wherein the Court said:

> "At some points processing and manufacturing will merge, but where the commodity retains a continuing substantial identity through the processing, we cannot say that it has been manufactured within the meaning of 203(b)(6)."

Applying this Honorable Court's opinion in the *Hartranft v. Wiegmann* case, *121 U. S. 609*, that "manufacture

implies a change but every change is not manufacture," the District Court found that frozen fruits and vegetables were within the scope of the agricultural exemption for the reason that the only thing that happened to the fresh product after it left the farmer's hand and before appearing in the familiar frozen food carton, was a processing as distinguished from manufacture. (See *Home Transfer and Storage Co. v. United States, 141 Fed. Supp. 599, affirmed by the Supreme Court of the United States without opinion, November 5, 1956, 352 U. S. 884.)* Likewise, the District Court held the commodities of dried egg powder; dried egg yolks; powdered milk and buttermilk, to be exempt for the reason that these commodities, having agricultural origin, had undergone some processing but retained their original identity. The decision of the District Court as to these items is plainly within the rule laid down by this Honorable Court prescribing the substantial continuing identity test.

We respectfully submit, therefore, that the defendants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Carl L. Phinney

CARL L. PHINNEY.
PHINNEY AND HALLMAN,
CARL L. PHINNEY,
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Dallas, Texas.,
Attorneys for Frozen Food Express, Plaintiff.

PROOF OF SERVICE

I, Carl L. Phinney, attorney for Frozen Food Express, plaintiff herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of June, 1957, I served copies of the foregoing Motion to Affirm on the several parties thereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Honorable J. Lee Rankin, Solicitor General, and to its attorneys of record, James E. Kilday, Esq., U. S. Department of Justice, Washington 25, D. C., and Malcolm R. Wilkey, Esq., United States Attorney, Houston, Texas.

2. On the Interstate Commerce Commission, defendant herein, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Mr. Charlie H. Johns, Jr., attorney for the Interstate Commerce Commission, at the office of the Interstate Commerce Commission, Washington 25, D. C.

3. On the Secretary of Agriculture as intervening plaintiff by mailing copy in duly addressed envelope, with postage prepaid, to his attorney of record, Charles W. Bucy, Office of the Solicitor, U. S. Department of Agriculture, Washington 25, D. C.

4. On the several intervening defendants by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to-wit: Peter T. Beardsley c/o American Trucking Associations, Inc., 1424 Sixteenth St., N. W., Washington 6, D. C.; Dale C. Dillon,

944 Washington Bldg., Washington 5, D. C.; James W. Nisbet, 280 Union Station Bldg., Chicago 6, Illinois; Carl Helmetag, c o Pennsylvania Railroad, Transportation Center Building, Six Penn Center Plaza, Philadelphia, Pennsylvania.

Carl L. Phinney

CARL L. PHINNEY.

PHINNEY AND HALLMAN,
CARL L. PHINNEY,
LEROY HALLMAN,
617 First National Bank Bldg.,
Dallas, Texas,
Attorneys for Frozen Food Express, Plaintiff.

EXHIBIT "A"

In the

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

December 31, 1956

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge:

The history of this litigation and the issues which it raises are fully reflected in the opinion of this Court on original submission (128 F. Supp. 374) to which reference is here made. Our dismissal of the action on that occasion, on the ground that the challenged order of the Interstate Commerce Commission was one not subject to judicial

review, was reversed by the Supreme Court (351 U. S. 40), and the action remanded for consideration on the merits. This requires a review of the action of the Interstate Commerce Commission in classifying the many commodities enumerated in the petition of the Plaintiff, or in the intervening petition of the Secretary of Agriculture, as "agricultural commodities" (in which event under §303 (b)(6) of Title 49, U. S. C. A., their carriage by a motor carrier is substantially free from I. C. C. regulation and control), or as "manufactured products" of agricultural commodities, in which event they enjoy no such exemption.

The commodities enumerated in Plaintiff's complaint, classification of which we are called upon to review are: slaughtered cattle; fresh meat; meat products; frozen whole eggs; dried egg powder; dried egg yolks; cottage cheese; cream cheese; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; butter; cottonseed meal; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); fruits and vegetables canned; dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk condensed; milk, skimmed, vitamin D; milk,

powdered; buttermilk; feathers; frozen meat; frozen dressed poultry.

Those raised by the petition in intervention of the Secretary of Agriculture are as follows: frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

Since this action was here before, recent decisions have removed the uncertainty surrounding a number of these commodities. In the related case of *East Texas Motor Freight Lines, Inc. v. Frozen Food Express (128 F. Supp. 374 at 379)*, we considered slaughtered cattle, fresh and frozen meat and meat products to be non-exempt, from which portion of the judgment in that proceeding no appeal was taken. Our holding that fresh and frozen dressed poultry was exempt was affirmed (351 U. S. 49); wherein the Supreme Court announced the so-called "continuing substantial identity" test, quoting from *Anheuser-Busch Assn. v. U. S. (207 U. S. 556 at 562)*:

> "* * * Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Wiegmann, 121 U. S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use'."

and saying

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing

substantial identity through the processing stage, we cannot say that it has been 'manufactured' within the meaning of § 203(b)(6)."

Applying this most recent test, a three-judge District Court of the District of New Jersey in *Consolidated Truck Service, Inc. v. U. S. (144 F. Supp. 814)*, held that shelled, raw nuts were exempt, and that the incidental processing to which they were subjected, namely, shelling, drying, cleaning, polishing, bleaching, grading, sorting and refrigerating, did not constitute manufacture. And the District Court for the Western District of Washington held frozen fruits and vegetables to be exempt in *Home Transfer and Storage Company v. U. S. (141 F. Supp. 599)*. This holding was affirmed, without opinion, by the Supreme Court November 5, 1956 *(352 U. S. 884)*.

Prior to this action by the Court, frozen fruits and vegetables had become a particular bone of contention in the prolonged struggle over the extent and scope of the agricultural exemption. There is a heavy volume of motor carrier traffic in this commodity. The processing to which the fresh product is subjected, after leaving the farmers' hands and before appearing in the familiar frozen-food carton on the grocers' shelves, is extensive and complicated. In holding frozen fruits and vegetables to be exempt, the *Home Transfer* case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid I. C. C. control in the carriage of these commodities.

With this background, the following commodities, of agricultural origin, having undergone some processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled, ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

For the reason set forth in our opinion *Frozen Food Express v. U. S. (128 F. Supp. 374 at 379 et seq.)*, we hold to be non-exempt the following: slaughtered cattle, fresh meat, meat products. We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment

and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a "manufactured product," it may well be that these items illustrate the point at which processing merges with manufacturing.[1]

Except to the extent noted above, the determination, classification, and order of the Interstate Commerce Commission holding commodities hereinabove enumerated to be non-exempt are not in accor[illegible] with law, and the enforcement thereof will be enjoined.

Clerk will notify counsel.

Done at Houston, Texas, this 31st day of December, 1956.

/s/ J. C. HUTCHESON, JR.,
Chief Judge, Fifth Circuit.

/s/ BEN C. CONNALLY,
United States District Judge.

/s/ T. M. KENNERLY,
United States District Judge.

[1]In the *Determination Proceedings* before the Interstate Commerce Commission, no exception was taken to the holding that canned goods were exempt. Here, the United States (through the Department of Justice), the Secretary of Agriculture, the Interstate Commerce Commission and all other Defendants and Intervenors urge that canned goods are non-exempt. Only the plaintiff contends to the contrary.

EXHIBIT "B"

In the

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing

its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951, in a proceeding docketed by the Commission as No. MC-C-968, *Determination of Exempted Agricultural Commodities*, is enjoined, suspended, annulled, vacated and set aside insofar as the Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peaunts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches pealed, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leafs are not agricultural commodities within the meaning of Section 203(b)(6) of the Interstate Commerce Act [49 U. S. C. 303(b)(6)]; and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March, 1957.

J. C. HUTCHESON, Chief Judge,
United States Court of Appeals
for the Fifth Circuit.

BEN C. CONNALLY,
United States District Judge.

T. N. KENNERLY,
United States District Judge.